A

ONN YEE KIEN & ANOR

v.

ON GIIN CHUANG

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ABDUL AZIZ RAHIM JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: W-02(NCVC)(A)-2976-12-2012]

C

24 APRIL 2013

LAND LAW: *Caveat - Private caveat - Application to extend caveat - Ex parte application - Whether ex parte application allowed only in exceptional circumstances - Whether there were exceptional circumstances to justify ex parte application - Whether caveator had ample time to file inter partes application - National Land Code, ss. 323(1), 326(1), (1B) & (2)*

D

LAND LAW: *Caveat - Private caveat - Application to extend caveat - Whether caveator proceeded promptly to enforce claims in respect of land in dispute - Whether caveat a temporary measure - Whether caveator's action contrary to established principles - Eng Mee Yong & Ors v. Letchumanan*

E

F

The respondent, who claimed to be a beneficiary, lodged a private caveat in respect of a land ('disputed land'), registered under the names of Ong Ku @ Hong Poe ('Ong Ku') and Onn Kah Tiam, who had since died. However, after the lodging of the private caveat, the respondent did not commence any court action against the estate of Ong Ku to enforce any proprietary claims (if he had any) under s. 323(1) of the National Land Code ('NLC') in respect of the disputed property. The appellants, the personal representatives of the estate of Ong Ku, pursuant to a grant of probate, being aggrieved by the presence of the respondent's caveat, applied for the removal of the private caveat under s. 326(1) of the NLC. On 28 June 2012, the Registrar of Title, pursuant to s. 326(1A) of the NLC, served on the respondent a Form 19C notice for the removal of the caveat. The respondent, on 5 July 2012, filed an *ex parte* originating summons seeking to extend the life of his private caveat which was allowed by the High Court Judge. However, the *ex parte* originating summons was never served on the appellants and thus, the appellants were never

G

H

I

aware of the application. Subsequently, the appellants filed an *inter partes* originating summons applying to set aside the *ex parte* order contending, *inter alia*, that the respondent's *ex parte* originating summons should not have been made *ex parte*. Instead, in the circumstances of the case, it should have been made *inter partes*. However, the High Court dismissed the appellants' *inter partes* originating summons application and hence, this appeal. The appellants submitted that as a rule, an application under s. 326(2) of the NLC must be made *inter partes* and only in exceptional circumstances could the application be made *ex parte*. The respondent, however, contended that there were exceptional circumstances in the present case that justified the making of the application *ex parte*. The respondent argued that he had only one month to make the application *ie*, from 1 June 2012, the date of the Form 19C notice and not 28 June 2012, the date of its service on the respondent.

Held (allowing appeal with costs; setting aside order of High Court)

Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) *Mexaland Development Sdn Bhd & Anor v. Score Option Sdn Bhd & Ors* correctly stated the law as to the interpretation of s. 326(2) of the NLC that, as a rule, the application to the court to extend the life of the caveat must be made *inter partes* and not *ex parte;* and that only in exceptional circumstances can the application be made *ex parte*. The applicant/caveator bears the legal burden to satisfy the court that exceptional circumstances exist. (para 26)

(2) The provisions of s. 326(1B) of the NLC is also clear that the two month period begins on the date as "specified in the notice". On the facts, Form 19C that was actually issued and served by the Registrar on the respondent stated that the notice period would expire two months from the date of service of the notice. The notice was served on the respondent on 28 June 2012 which meant that the respondent had ample time to make the application *inter partes*. There was no ambiguity at all either in law or in the notice served on the respondent. (paras 30 & 31)

(3) Even assuming that time began to run only on 1 June 2012, when the respondent filed his *ex parte* application on 5 July 2012, he still had the time to make the application *inter partes* instead of *ex parte* since the caveat would only expire on 1 August 2012. (para 32)

(4) Further, after the lodging of the private caveat, the respondent did not commence any court action against the estate of Ong Ku to enforce any of the proprietary claims (if he has any) as provided under s. 323(1) of the NLC in respect of the disputed property. Neither did he state anywhere in his supporting affidavit that he intended to commence any such action in the near future. The conduct on the part of the respondent was contrary to the principles laid down in *Eng Mee Yong & Ors v. Letchumanan.* (para 34)

Bahasa Malaysia *Translation Of Headnotes*

Responden, yang mendakwa bahawa dia adalah salah seorang benefisiari, telah memasukkan kaveat persendirian ke atas sebidang tanah ('tanah yang dipertikaikan'), yang didaftarkan atas nama Ong Ku @ Hong Poe ('Ong Ku') dan Onn Kah Tiam, yang telah meninggal dunia. Walau bagaimanapun, selepas memasukkan kaveat persendirian tersebut, responden tidak memulakan apa-apa tindakan mahkamah terhadap harta pusaka Ong Ku untuk menguatkuasakan apa-apa tuntutan hak milik (jika ada) di bawah s. 323(1) Kanun Tanah Negara ('KTN') bagi tanah yang dipertikaikan tersebut. Perayu-perayu, wakil diri kepada harta pusaka Ong Ku menurut geran probet, yang terkilan dengan kewujudan kaveat persendirian responden, memohon untuk membatalkan kaveat persendirian tersebut di bawah s. 326(1) KTN. Pada 28 Jun 2012, Pendaftar Hak Milik, berikutan s. 326(1A) KTN, menyerahkan kepada responden, notis Borang 19C bagi membatalkan kaveat tersebut. Responden, pada 5 Julai 2012, memfailkan saman pemula *ex parte* bagi melanjutkan hayat kaveat persendiriannya dan permohonan ini dibenarkan oleh Hakim Mahkamah Tinggi. Walau bagaimanapun, saman pemula *ex parte* tersebut tidak diserahkan kepada perayu-perayu dan dengan itu, perayu-perayu tidak mengetahui tentang permohonan tersebut. Seterusnya, perayu-perayu memfailkan saman pemula *inter partes* memohon pengenepian perintah *ex parte* tersebut dengan menghujahkan, antara lain, bahawa saman pemula *ex parte*

responden, tidak sepatutnya dibuat secara *ex parte*. Sebaliknya, dalam hal keadaan kes ini, ia sepatutnya dibuat secara *inter partes*. Walau bagaimanapun, Mahkamah Tinggi menolak permohonan saman pemula *inter partes* perayu-perayu dan dengan itu, rayuan ini. Perayu-perayu menghujahkan bahawa dalam undang-undang, sesuatu permohonan di bawah s. 326(2) KTN mesti dibuat secara *ex parte*. Responden, walau bagaimanapun, menghujahkan bahawa terdapat hal keadaan yang luar biasa dalam kes ini yang mewajarkan permohonan *ex parte*. Responden menghujahkan bahawa dia hanya mempunyai tempoh sebulan untuk membuat permohonan tersebut, iaitu dari tarikh 1 Jun 2012, tarikh notis Borang 19C dan bukan 28 Jun 2012, tarikh penyerahannya kepada responden.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Tinggi)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) *Mexaland Development Sdn Bhd & Anor v. Score Option Sdn Bhd & Ors* telah dengan betul menyatakan undang-undang berkaitan tafsiran s. 326(2) KTN bahawa, di bawah undang-undang, permohonan kepada mahkamah untuk melanjutkan hayat kaveat mesti dibuat secara *inter partes* dan bukan secara *ex parte*; dan hanya dalam hal keadaan luar biasa sahaja permohonan tersebut boleh dibuat secara *ex parte*. Pemohon/pengkaveat memikul beban pembuktian di sisi undang-undang untuk membuktikan kepada mahkamah bahawa wujud hal keadaan luar biasa.

(2) Peruntukan s. 326(1B) KTN juga jelas bahawa tempoh dua bulan bermula dari tarikh seperti "yang dinyatakan dalam notis". Berdasarkan fakta, notis Borang 19C yang sebenarnya dikeluarkan dan diserahkan oleh Pendaftar kepada responden menyatakan bahawa tempoh notis akan tamat dua bulan dari tarikh penyerahan notis. Notis tersebut diserahkan kepada responden pada 28 Jun 2012 yang bermaksud bahawa responden mempunyai banyak masa untuk membuat permohonan *inter partes*. Tidak wujud sama sekali ketaksaan, sama ada dari segi undang-undang atau dalam notis yang diserahkan kepada responden.

A **(3)** Dengan menganggap bahawa masa bermula hanya dari 1 Jun 2012, apabila responden memfailkan permohonan *ex parte* pada 5 Julai 2012, dia masih mempunyai masa untuk membuat permohonan *inter parte* dan bukan *ex parte* kerana kaveat tersebut hanya akan tamat pada 1 Ogos 2012.

B

(4) Selanjutnya, selepas memasukkan kaveat persendirian, responden tidak memulakan apa-apa tindakan mahkamah terhadap harta pusaka Ong Ku untuk menguatkuasakan apa-apa tuntutan hak milik (jika ada) seperti yang diperuntukkan di
C bawah s. 323(1) KTN berkaitan tanah yang dipertikaikan. Dia juga tidak menyatakan di mana-mana dalam afidavit sokongannya bahawa dia berniat untuk memulakan tindakan sedemikian dalam tempoh terdekat. Tindakan responden adalah bertentangan dengan prinsip yang dinyatakan dalam kes *Eng*
D *Mee Yong & Ors v. Letchumanan*.

Case(s) referred to:
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(foll)***
Mexaland Development Sdn Bhd & Anor v. Score Option Sdn Bhd & Ors [2008] 8 CLJ 727 HC ***(refd)***
E *Re Hitchcock [1900] 17 WN (NSW) 62* ***(refd)***

Legislation referred to:
National Land Code, ss. 323(1), 326(1A), (1B), (2)

For the appellants - SH Leong; M/s Thomas Philip
F *for the respondent - Lim Koon Huan (Teoh Chooi Hui with her); M/s Skrine*

[Appeal from High Court, Kuala Lumpur; Originating Summons No. 24(NCVC)-2180-08-2012]

Reported by S Barathi

G

JUDGMENT

Hishamudin Mohd Yunus JCA:

H

Introduction

[1] This is an appeal against the decision of the High Court of Kuala Lumpur given on 8 November 2012.

I **[2]** On 8 November 2012, the High Court of Kuala Lumpur had dismissed the appellants' application to set aside an *ex parte* order granted by the High Court to the respondent on 18 July 2012.

[3] The High Court *ex parte* order of 18 July 2012 was made pursuant to an *ex parte* Originating Summons (OS No. 24(NCVC)-1740-07-2012) application to the High Court by the respondent seeking an extension of his private caveat that was due to expire on 28 August 2012 (in his supporting affidavit the respondent erroneously states the date of expiry of the private caveat to be '1 August 2012' – but this is a matter that will be discussed later in this judgment).

Decision Of This Court

[4] We, unanimously, have allowed this appeal with costs.

[5] We now give our grounds.

Facts Of The Case

[6] On 23 February 2012, the respondent lodged a private caveat in respect of a piece of land, namely, a land held under title GRN 266860, Lot 803, Mukim of Rawang, District of Gombak, Selangor ('the disputed property'); thereby restraining any dealing in respect of the disputed property.

[7] This land is registered in the names of two co-owners, namely:

(1) Ong Ku @ Hong Poe (1/2 share); and

(2) Onn Kah Tiam (1/2 share).

[8] Both these registered co-owners have died. They were husband and wife. Ong Ku @ Hong Poe (the wife) died on 22 June 2009; whilst Onn Kah Tiam (the husband) died earlier on 14 September 2008.

[9] The respondent gives the following reasons for lodging the caveat. He claims to be a beneficiary of the estate of Onn Kah Tiam. He states that the late Onn Kah Tiam died leaving a will and naming the respondent as one of the beneficiaries under the will; that under the will his share in respect of the disputed property is '1/6'; that there is a dispute between the children of the deceased couple: those claiming to be the beneficiaries of the estate of Ong Ku @ Hong Poe on the one hand, and those claiming to be the beneficiaries of the estate of Onn Kah Tiam, on the other; culminating in a civil suit at the Kuala Lumpur High Court (High Court Kuala Lumpur Civil Suit No. S-22-422-2010).

[10] The respondent, however, is not a party to this Civil Suit (S-22-422-2010); but the personal representatives of the estate of Onn Kah Tiam are cited as the defendants in the civil suit.

[11] It is not disputed that after the lodging of the private caveat, the respondent did not commence any court action against the estate of Ong Ku @ Hong Poe to enforce any of the proprietary claims (if he has any) as enumerated in s. 323(1) of the National Land Code ('the NLC') in respect of the disputed property. And neither does he state anywhere in his supporting affidavit (in applying to extend the life of his private caveat) that he intends to commence any such action in the near future.

[12] The appellants are the personal representatives (also the executors and trustees under the will of Ong Ku @ Hong Poe) of the estate of Ong Ku @ Hong Poe pursuant to a grant of probate. They are aggrieved by the presence of the respondent's private caveat in the title of the disputed property. They, accordingly, made an application pursuant to s. 326(1) of the NLC to the Registrar of Title for the removal of the private caveat.

[13] On 28 June 2012 the Registrar of Title, pursuant to s. 326(1A) of the NLC, served on the respondent (the caveator) with a Form 19C Notice for the removal of the caveat.

[14] Section 326(1A) of the NLC provides:

> (1A) On receiving any application for removal under this section, the Registrar shall:
>
> (a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and
>
> (b) make an endorsement on the register document of title that the notice in Form 19C has been served on the person or body at whose instance the caveat was entered and of the date of such service, and shall sign and seal the endorsement.

[15] Under the NLC, once the form 19C Notice is served on the caveator, the provision of s. 326(1B) comes into operation: the caveat shall lapse and be of no effect at the expiry of two months (from the date of the service of the form 19C notice on the caveator), unless, before the expiry date, the Registrar of Title is served with an order of the court extending the life of the caveat.

[16] Section 326(1B) of the NLC provides: A

> (1B) In the case in which a notice of intended removal in Form 19C has been served under subsection (1A), the caveat shall lapse and be of no effect at the expiry of two months specified in the notice unless before the expiry of that period the Registrar shall have been served with an order of the Court extending the time provided in the said notice. B

[17] And s. 326(2) of the NLC provides:

> (2) The Court may, on the application of any person or body on whom such a notice has been served under sub-section (1A) (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of two months; and the Registrar, on being duly served with an order of the Court under this sub-section, shall make an endorsement on the register document of title of the date of the service on him of the order and of the period of the extension, and shall sign and seal the endorsement. C D

[18] Now, upon being served with the Form 19C notice, and purporting to invoke s. 326(2) of the NLC, the respondent, on 5 July 2012, filed an *ex parte* Originating Summons (OS No. 24(NCVC)-1740-07-2012) seeking to extend the life of his private caveat (which would expire on 28 August 2012 unless extended by an order of the court). The *ex parte* origination summons was never served on the appellants. So the appellants were never aware of the *ex parte* originating summons. The learned High Court Judge, after hearing the *ex parte* application, on 18 July 2012, granted an *ex parte* order extending the life of the caveat 'until further order'. E F

[19] On 17 August 2012, the appellants filed an *inter partes* Originating Summons (OS No. 24(NCVC)-2180-08-2012) applying to set aside the *ex parte* order of 18 July 2012 contending, among other grounds, that the respondent's *ex parte* Originating Summons (OS No. 24(NCVC)-1740-07-2012), applying for the extension of the life of his private caveat, should not have been made *ex parte*; instead, in the circumstances of the case, it should have been made *inter partes* as there was no justification to make the application *ex parte*. G H I

The Order Of The High Court

[20] On 8 November 2012, the appellants' *inter partes* originating summons application was dismissed; but the court made no order as to costs.

[21] Hence, the present appeal to the Court of Appeal.

The Grounds Of Judgment Of The High Court

[22] In her grounds of judgment, the learned judge, after referring to the provision of s. 326(2) of the NLC, states:

> Thus, pursuant to the above express provision of the NLC, and after hearing the oral submissions of learned counsel for the defendant, and in view of the urgent circumstances of the matter due to the pending 422 Suit [High Court of Kuala Lumpur Civil Suit No. S-22-422-2010], on 18.7.2012 I allowed the defendant's *ex parte* application to extend the defendant's caveat.

[23] However, the learned High Court Judge in her grounds does not explain what she meant by:

> in view of the urgent circumstances of the matter due to the pending 422 Suit [High Court of Kuala Lumpur Civil Suit No. S-22-422-2010].

Appellants' Submission

[24] Before us, Encik S H Leong, learned counsel for the appellants, submits that as a rule an application under s. 326(2) of the NLC must be made *inter partes*; only in exceptional circumstances can the application be made *ex parte*. Learned counsel argues that there is nothing exceptional about the present case. Learned counsel cites the High Court case of *Mexaland Development Sdn Bhd & Anor v. Score Option Sdn Bhd & Ors* [2008] 8 CLJ 727 where the High Court, in interpreting s. 326(2), held (at pp. 98-99, paras. [8] to [10]):

> [8] My interpretation of the above provisions is that, as a rule, the application must be made *inter partes* and not *ex parte*. The words in brackets:
>
> (and acting, if the circumstances so require, *ex parte*),
>
> in the above section, mean that only if the circumstances so require could the application be made *ex parte*. This implies that as a rule the application must be made *inter partes* and not

ex parte. The applicant/caveator does not have a freedom of choice whether to proceed *inter parte* or *ex parte*. It is only in exceptional cases that he can make the application *ex parte*. This has to be the interpretation, for it would not be fair to the registered landowner/caveatee if the application to extend the caveat were to be made without his knowledge; when in the first place it was he who had applied to the Land Administrator/Registrar (*via* s. 326(1) and Form 19H of the National Land Code) for the caveat to be removed. The caveat, as long as it exists, affects his rights in dealing with his land (see s. 322, subsections (2) and (3) of the National Land Code). Under s. 326 the applicant/caveator has two months to make the application to the Court. Thus there is ample time given to him to take the necessary step to extend the life of his caveat.

[9] And when the caveator makes the application *ex parte*, instead of *inter partes*, he must explain his justification for doing so. It is mandatory for him to do so. The legal and evidential burden is on him. This is required by subsection (2) of s. 326, in particular, by the words:

If the circumstances so require

[10] Therefore, in the application that is now before me, the question arises: Do the circumstances require the application by the 1st plaintiff to be made *ex parte*? I have examined the affidavit but I fail to find anywhere in the affidavit averments to explain and to justify as to why the application had to be made *ex parte* (instead of *inter partes*). Instead, what I do find is that the 1st plaintiff/applicant has had sufficient time to make the application *inter partes* after it was served with Form 19C on 21 May 2007.

Respondent's Submission

[25] Learned counsel for the respondent, Ms Lim Koon Huan, on the other hand submits that, although she agrees with the decision in *Mexaland Development* that as a rule the application must be made *inter partes* and not *ex parte*, nevertheless, she contends that there were exceptional circumstances in the present case that justify making the application *ex parte*. She argues that the respondent had only one month to make the application as the Form 19C notice that was served on the respondent was dated 1 June 2012. She argues that time begins to run from this date, '1 June 2012', and not from the date of service of the form 19C notice on the respondent, that is, 28 June 2012.

A **The Grounds For The Decision Of This Court**

[26] With respect, we find no merit in Ms Lim's argument. Firstly, we agree with the views of both counsel that the High Court in *Mexaland Development* correctly states the law as to the
B interpretation of s. 326(2) of the NLC; that as a rule the application to the court to extend the life of the caveat must be made *inter partes* and not *ex parte*; and that only in exceptional circumstances can the application be made *ex parte* (the legal burden being on the applicant/caveator to satisfy the court that
C exceptional circumstances exist).

[27] Secondly, we find the provisions of the NLC to be clear as to when the two-month period begins. Section 326(1B) states:

> ... the caveat shall lapse and be of no effect at the expiry of two
D months **specified in the notice** ... (emphasis added)

[28] Subsection (1B) states '... specified in the notice ...'. So, we must examine the Form 19C notice itself; what does the form 19C notice say. Now, Form 19C notice as prescribed by the first
E schedule to the NLC provides:

> Take notice that, in exercise of the powers conferred by section 326 of the National Land Code, I shall, at the expiry of the period of two months **from the date of service of this notice**, or of such further period (if any) as the Court may order,
F remove the caveat. (emphasis added)

[29] And the Form 19C notice that was actually issued and served by the Registrar on the respondent on 28 June 2012 states:

G > Adalah diberi notis bahawa, pada menjalankan kuasa-kuasa yang diberi oleh Seksyen 326 Kanun Tanah Negara, saya akan, apabila habis tempoh dua bulan **dari tarikh penyampaian notis ini**, atau sesuatu tempoh yang lanjut (jika ada) sebagaimana yang diperintahkan oleh mahkamah, memotong kaveat itu. (emphasis
H added)

[30] Thus, as we see it, there is no ambiguity at all either in the law or in the notice that was actually served on the respondent. The law and the notice are crystal clear. The two-month period begins from the date of the service of the Form 19C notice on
I the caveator.

[31] In the present case, it is not disputed that the Form 19C notice was served on the respondent on 28 June 2012. This means that the respondent had ample time (two months) to make the application (to extend the life of the private caveat) *inter partes*.

[32] But even assuming for the moment (for the sake of argument) that time begins to run only from the date as stated in the form 19C notice, that is to say, '1 June 2012', still, when the respondent filed his *ex parte* application on 5 July 2012, he still had time to make the application *inter partes* instead of *ex parte* since the caveat would only expire on (hypothetically speaking) 1 August 2012.

[33] On the above ground alone it would be sufficient for us to dispose of the appeal in the appellants' favour.

[34] However, we would like to add that there is yet another reason as to why the extension order must be set aside. As we have pointed out at the earlier part of our judgment, in the present case, the respondent, after the lodging of the private caveat, did not commence any court action against the estate of Ong Ku @ Hong Poe to enforce any of the proprietary claims (if he has any) as enumerated in s. 323(1) of the National Land Code ('the NLC') in respect of the disputed property. And neither does he state anywhere in his supporting affidavit (in applying to extend the life of his private caveat) that he intends to commence any such action in the near future. This conduct on the part of the respondent is contrary to the principle as laid down in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 that a caveator, once he has lodged his private caveat against a particular piece of land, must take prompt action to enforce his claim in respect of the land in question. In *Eng Mee Yong* Lord Diplock, in delivering the judgment of the Privy Council, said (at p. 215):

> So too in an application by the [caveatee] (sic) under section 327 for removal of a caveat, once the [caveator] (sic) has met the requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

[35] Learned counsel for the respondent, however, argues that the requirement to commence a court action timeously does not apply in the present case; and that it only applies in cases of sale and purchase agreements. With respect, we disagree with such a narrow application of the above principle as prescribed by *Eng Mee Yong*. No person should be allowed to lodge a caveat over another person's land and, thereafter, just sit back and do nothing to enforce any claim to the proprietary right that he alleges he has in respect of the caveated land (for example, a claim to title; or, a claim to a registrable interest). That would not be fair to the landowner who, while the caveat exists, is prohibited from dealing with his land. The lodging of a caveat is not an end in itself; it is just a means, a temporary measure, to preserve the caveator's claim to a proprietary right in respect of a land, pending determination of that claim by a court. In *Eng Mee Yong* Lord Diplock said (at p. 214):

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose.

[36] And, in an Australian case, the caveat has been described as 'nothing more than a statutory injunction to keep the property in *status quo* until the court has had an opportunity of discovering what are the right of the parties' (per Owen J in *re Hitchcock* [1900] 17 WN (NSW) 62 at 63).

[37] We, therefore, set aside the order of the High Court; and we granted the reliefs as prayed for in the appellants' originating summons.